In the Supreme Court of the United States

October Term, 1952

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, *Petitioner*

v.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR REHEARING

The Acting Solicitor General, on behalf of petitioner, respectfully prays for a rehearing of this case before a full bench.

Certiorari was granted in this case on March 9, 1953, with all Justices of this Court participating in the consideration of the petition. Journal, p.

153. The case was argued on April 29, 1953, before a bench comprised of eight Justices; Mr. Justice Jackson was not sitting on that day. Journal, p. 200. A judgment of affirmance by an evenly divided court of eight Justices was entered on May 4, 1953, with a notation that Mr. Justice Jackson took no part in the consideration or decision of the case. Journal, p. 207.

This petition for rehearing is predicated on the assumption that Mr. Justice Jackson took no part in the consideration or decision of this case only because of his absence from the bench during the oral argument. Since Mr. Justice Jackson participated in the granting of the writ, it would appear that, after he recovers from his present illness, an argument could be had before the full bench.

This Court frequently granted a rehearing following a decision by an equally divided court, especially when a Justice who did not participate in the original decision was available to participate on rehearing. *Home Insurance Co.* v. *New York*, 119 U.S. 129, 148, 122 U.S. 636, 134 U.S. 594; *Selma, Rome & Dalton R.R. Co.* v. *United States*, 122 U.S. 636-637, 139 U.S. 560; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 586, 158 U.S. 601, 602-607; *United States* v. *Grimaud*, 216 U.S. 614, 615, 220 U.S. 506; *United States* v. *Sischo*, 260 U.S. 697-698, 260 U.S. 701, 262 U.S. 165; *United States* v. *One 1936 Model Ford V-8 De Luxe Coach*, 305 U.S. 564, 305 U.S. 666, 307 U.S. 219; *Gray* v.

Powell, 312 U.S. 666, 313 U.S. 596, 314 U.S. 402; *Haliburton Co.* v. *Walker*, 326 U.S. 696, 327 U.S. 812, 329 U.S. 1; *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 327 U.S. 758, 327 U.S. 812, 329 U.S. 402, *Bruce's Juices* v. *American Can Co.*, 327 U.S. 658, 327 U.S. 812, 330 U.S. 743.

This case is an appropriate one for rehearing. The decision of the Court of Appeals, which has been affirmed only because of the equal division of this Court, is in conflict with the decisions of two other courts of appeals (*Conway* v. *Glenn*, 193 F. 2d 965 (C.A. 6th), and *Burr* v. *Commissioner*, 156 F. 2d 871 (C.A. 2d), certiorari denied, 329 U.S. 785), on a recurring question of importance in the administration of the federal estate tax. Since the Courts of Appeals for the Second and Sixth Circuits presumably will continue to apply the statute in the same manner as they did in the *Conway* and *Burr* cases, the existing conflict can be resolved only by a decision of this Court in which a majority of the Justices concur. Since no such decision has been made here, it is inevitable that there will be continued litigation of this issue in the lower courts and a continuing conflict of decisions among the Courts of Appeals. The longer such conflict on an important question of federal law remains unresolved, the greater the litigation-breeding uncertainty which will burden the lower federal courts and the bar. This unsettled state of the law can be avoided if, on rehearing, the issue in the

present case can be decided by a majority of the Justices of this Court.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

I certify that this petition is presented in good faith and not for delay.

ROBERT L. STERN,
Acting Solicitor General

May, 1953.

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RESPONSE TO PETITION FOR REHEARING.

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RESPONSE TO PETITION FOR REHEARING.

Respondents respectfully pray that the Court deny the petition for rehearing. A definitive ruling on the underlying tax issue is not required by grave public interest. The instant case involves an estate tax problem, interesting but of comparatively minor importance, that has arisen infrequently in the past and has become moot under the present statutes. Rehearing and reargument will impose an unjustifiable burden upon the Court, as well as upon respondents.

REHEARING SHOULD BE DENIED UNLESS REQUIRED BY GRAVE PUBLIC INTEREST.

Petitioner states that this Court frequently granted a rehearing following a decision by an equally divided court. In support of this proposition he cites ten cases, spanning a period of about sixty years—1886 to 1945.

It is submitted that the true test, consistently applied by the Court, is whether or not the issue in the case is of such national importance as to justify burdening the Court and the parties with reargument and reconsideration.

Petitioner's earliest citation (*Home Insurance Co.* v. *New York*, 119 U. S. 129, 148, 122 U. S. 636, 134 U. S. 594) was so explained a year after that decision in *Shreveport* v. *Holmes* and related cases, 125 U. S. 694 (1887). The Court, by Mr. Chief Justice Waite, stated:

> "These petitions are denied. The rehearing was granted in *Home Insurance Co.* v. *New York*, 119 U. S. 129, after a decision by a divided court, because an important constitutional question was involved. The questions in these cases are not of that character."

The other cases cited by petitioner in which rehearings were granted also involved issues of grave national significance. One involved the constitutionality of the income tax, the fundamental power of the Federal Government to impose this tax without apportionment in accordance with the national census. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 158 U. S. 601, 602-607. Another involved the extent to which Congress could delegate legislative power to Federal administrative officers. *United States* v. *Grimaud*, 216 U. S. 614, 615, 220 U. S. 506. Others involved broad considerations of trade

r commerce.[1] These were issues imperatively demand-
ng determination by this Court.

Even where the issues are important, further objections
rise to rehearings. In *Brown* v. *Aspden*, 55 U. S. 25
1853), the basic issue was deemed of such importance
hat the Court had allowed counsel a full week for argu-
nent. The decision below was affirmed by an equally di-
ided Court. Rehearing was sought and denied. After
eviewing the practice concerning rehearings in both the
Inited States and England the Court concluded that grant-
ng rehearings tended toward carelessness in the argu-
nent and consideration of cases in the first instance, as
well as unjustifiable delay and expense. The Court, speak-
ng through Mr. Chief Justice Taney commented upon the
effect of an equal division as follows:

> "Nor is the circumstance, that a decree is affirmed by a divided court, any reason for ordering a reargument before a full bench in any case. In a body as numerous as this, it must often happen, from vari-

1. *Home Insurance Co.* v. *New York*, 134 U. S. 594 (1890) (constitutionality of state tax with relation to U. S. tax-exempt bonds); *Selma, Rome & Dalton R. R. Co.* v. *United States*, 139 U. S. 560 (1891) (status of claims against U. S. where funds for payment seized by Confederacy); *Pollock* v. *Farmer's Loan & Trust Co.*, 158 U. S. 601, 602-607 (1895) (power of U. S. to impose income tax without apportionment according to census); *United States* v. *Grimaud*, 220 U. S. 506 (1911) (power of Congress to delegate legislative power to executive department); *United States* v. *Sischo*, 262 U. S. 165 (1923) (construction of statute vital to combating of smuggling and dope traffic); *United States* v. *One 1936 Ford V-8 De Luxe Coach*, 307 U. S. 219 (1939) (relation between government right of forfeiture and property rights of individual); *Gray* v. *Powell*, 314 U. S. 402 (1941) (extent of judicial review of administrative legal determination); *Halliburton Co.* v. *Walker*, 329 U. S. 1 (1946) (scope of protection of combination patents); *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402 (1947) (right of patent licensee to defend suit for royalties on grounds of invalidity of patent, misuse of patent by patentee, and invalidity of price-fixing agreement); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947) (effect of violation of Robinson-Patman Act upon legality of sales contracts).

> ous causes, that the bench is not full. And experience has shown, that it has rarely happened that every judge has been present every day throughout any one entire term. The case before us is certainly an important one, in its principles and in the amount in dispute. But there are many cases on the docket at every term of the court much more important in both respects. And if it is to be understood, that cases of this description are not to be finally decided without the concurrence of a majority of the whole bench, it would be an useless consumption of time to hear them in the absence of any one judge, because it would be uncertain whether a judgment could follow after the argument. And it is easy to foresee the inconvenience, delay, and expenses to which a practice of that kind would subject the parties, and the uncertainty and confusion it would produce (to the great injury of other suitors) in the order of business as it stands on the docket of the court."

A factor that is of serious importance is the existing pressure of business upon this Court. The time and energy of justices is not unlimited. That their burdens may be manageable, the justices have been given and have freely exercised the power to deny further review to many litigants with worthy and important issues.

The additional time that would be devoted to reargument and reconsideration of this case would have to be taken away from some other case. We suggest that there is scarcely a proceeding in which a petition for certiorari is now pending, many of which must be denied because of the lack of time to consider them all, in which the underlying issues are not of considerably more importance and national significance than in the instant case.

A further consideration is suggested. Ordinarily a petition for rehearing is predicated upon the assumption that the justices concurring in the majority opinion have disregarded or misconceived some vital element of fact or

law, and have been misled by an error which can be corrected upon rehearing. No such consideration prevails in the instant case.

THE ISSUE IN THIS CASE IS NOT OF NATIONAL IMPORTANCE OR BROAD APPLICATION.

The instant case arose during an era of transition in the estate tax treatment of life insurance, and prior to the adoption of new policies and rules by Congress. The Revenue Act of 1942, enacted October 21, 1942, provided for inclusion in the gross estate of insurance upon a decedent's life where he had paid the premiums or other consideration for the insurance, whether or not he possessed any of the incidents of ownership in the insurance. This new rule was expressly made inapplicable to premium payments made before January 10, 1941, if at no time thereafter the decedent possessed an incident of ownership in the policy. On this latter date, the Treasury Department had amended its estate regulations to adopt this same test. This amendment likewise provided that the insurance was includible only to the extent that the decedent had paid premiums after January 10, 1941. The 1942 legislation also eliminated the special $40,000 exclusion for life insurance proceeds.[2]

2. I. R. C. Sec. 811 (g) was amended by Sec. 404 (a) of the Revenue Act of 1942, to read as follows:

"(g) Proceeds of Life Insurance.—

(1) Receivable by the Executor.—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) Receivable By Other Beneficiaries.—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his

Under these comprehensive new rules, now in effect for over twelve years, the issue in this case cannot arise. It has become moot. Whether or not it might have been important in the past is immaterial. Today it is plain that the definitive settlement of this bygone issue by this Court cannot compete in importance with the many other problems pressing for its decision. It has already perhaps had more time and attention from this Court than it properly deserves.

Disagreement among the Courts of Appeals may attest to the difficulty of an issue but not to its importance. Disagreements and litigation arise as readily over small matters as over large ones. The Courts of Appeals must take what cases come to them, though the solution of the issues be important only to the parties or their counsel. Petitioner in this case has had the benefit of the careful consideration and judgment of the District Court and the Court of Appeals. The fact that other courts may have different views is not a good ground for further intrusion upon the affairs of this Court.

Although petitioner describes the issue here as a recurring question, the fact is that it has arisen in only three

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death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. * * *"

The 1942 amendment was effective as to estates of decedents dying after October 21, 1942, except as provided by Sec. 404 (c) of that Act as amended. Sec. 404 (c) of the Revenue Act of 1942, as amended by Sec. 503 (a) of the Revenue Act of 1950, provides in pertinent part as follows:

"(c) Decedents to Which Amendments Applicable.—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act [October 21, 1942]; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

other litigated cases.[3] He cites no other case presently pending in the courts, and respondents' research has disclosed none. Nor under the circumstances is any flood of litigation to be expected.

The estate tax, like other Federal tax laws, is replete with existing and potential questions of interpretation. It would be an impossible task for this court, or even the Tax Court, to pass upon all of these. The great bulk of such problems are never even presented to the courts. They are disposed of by give-and-take negotiation, often upon a wholly arbitrary basis, between representatives of the Bureau of Internal Revenue and the taxpayers, in the protest and conference procedure which has long been used by the Bureau. While this may not be an ideal procedure, it has long been the best available and it has fared well under the tests of experience and practicality. Such few controversies as may hereafter arise over the issue in the instant case can, in all probability, be largely settled by this administrative process.

REHEARING WOULD ALSO IMPOSE AN UNFAIR BURDEN UPON RESPONDENTS.

While we recognize that the personal interests of litigants must be subordinated to the public interest, we venture to suggest an additional consideration bearing upon the requested rehearing.

Respondents have been subjected to great expense in connection with a rather modest estate. They have borne the expense of conference procedure incident to assessment of the tax, the processing of a refund claim, litigation in the District Court, and appeals to the Court of Appeals and this

3. *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941); *Burr* v. *Commissioner*, 156 F. 2d 871 (C. C. A. 2, 1946), certiorari denied, 329 U. S. 785; *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6, 1952).

Court. Although petitioner had had his full day in court after the first appeal, he asked for a further hearing in this Court on the ground that an issue of great public importance was involved. To a substantial extent, respondents' expense thereafter may be deemed to have been incurred in the public interest, rather than for their benefit.

The government now asks the Court to subject respondents to still further expense, for the stated reason that other controversies may arise and litigation thereof might be obviated by a second hearing in this Court. Respondents respectfully suggest that if another such case should actually arise and not be disposed of by administrative settlement:

(1) The government would have an opportunity to present it to this Court for determination if it so desired.

(2) No greater burden would then be imposed upon the Court in hearing argument and determining that case than would be involved in reargument and reconsideration of the instant case; indeed, it would have the benefit of additional views of the lower courts and of new counsel.[4]

(3) The expense burden of obtaining such a determination in the public interest would be shared by other litigants who were immediately concerned, rather than by respondents who have already borne their full share of this burden.

(4) There is an element of public interest in the point that a taxpayer should not be deterred from asserting a just claim by the prospect of unnecessary expense.

4. If it be assumed that the question would then be regarded as of sufficient importance to justify hearing at all, such a determination would seem preferable to decision by a single Justice, which is the essence of the instant request for rehearing.

CONCLUSION.

It is respectfully requested that the petition for rehearing be denied.

Respectfully submitted,

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